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Violations of Human Rights in Time of War As War Crimes

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There is a tendency to consider the term “human rights” as being solely applicable to the peacetime protection of those rights and to consider the term “humanitarian law” as being applicable to the protection of human rights afforded by the law of war in time of war.¹ Without doubt, the humanitarian law of war includes much of the law which, in time of peace, would be termed human rights; and there is no reason why they should not continue to bear that title in time of war. However, it must be borne in mind that although all of the law of war is humanitarian, not all of the humanitarian law of war involves human rights. For example, while the provision of the law of war prohibiting the use of dum dum bullets² is unquestionably a humanitarian rule, it can scarcely be considered to be a human right.

In drafting the *1945 London Charter*, the instrument that created the International Military Tribunal which tried the major war criminals at Nuremberg, the draftsman included two provisions defining acts constituting violations of the humanitarian law of war and violations of human rights in time of war. Those provisions read as follows:

Article 6(b). War Crimes. Namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Article 6(c). Crimes against humanity. Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds...whether or not in violation of the domestic law of the country where perpetrated.³

The provisions of Article 5(b) and 5(c) of the Charter of the International Military Tribunal for the Far East which tried the major Japanese war criminals at Tokyo were substantially similar.⁴

The contention was frequently advanced that the provisions of Article 6(c) concerning *Crimes against Humanity*, and others like them, created new humanitarian rules, new war crimes, and were, therefore, *ex post facto* laws. This contention was uniformly rejected by the tribunals. In the case of *United States v. Otto Ohlendorf*, better known as The *Einsatzgruppen* case, the Military Tribunal stated:

Although the Nuernberg trials represent the first time that international tribunals have adjudicated crimes against humanity as an international offence, this does not . . . mean that a new offence has been added to the list of transgressions of man. Nuernberg has only demonstrated how humanity can be defended in court, and it is inconceivable that with this precedent extant, the law of humanity should ever lack for a tribunal.⁵

In view of the judicial precedents and the numerous subsequent actions of the international community recognizing crimes against humanity as a wartime offence under international law,⁶ the contention that crimes against humanity are not well-established violations of the humanitarian law of war now has no merit whatsoever.

A major example of a wartime violation of human rights occurred during World War I when the Imperial German Government caused the deportation from their homes in Belgium and France of a total of approximately 100,000 men, women and children, to be used as forced labour in Germany. This practice was discontinued, and many of the deportees were repatriated when the Imperial German Government responded to neutral indignation at this patent violation of human rights.⁷ During World War II, the Nazis relentlessly followed the same practice, but on a far greater scale, with an estimated total of 12,000,000 persons moved from their various home countries to Nazi Germany to perform forced labour, for the most part in munitions factories.⁸ In this instance, there were comparatively few neutral nations to express their indignation and, in any event, it is doubtful that such action on their part would have had any effect on Hitler's Nazi Government. The comparatively small percentage of deported persons who survived the extreme ill-treatment that they uniformly received were forced to remain in Germany as virtual slaves until rescued by Allied advances or until the German surrender. The prohibition of this practice has now been codified in Article 49 of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,⁹ the first paragraph of which states:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.¹⁰

While the Japanese also engaged in this practice of deportation of foreign civilians to Japan for labour purposes, they did so on a much smaller scale.¹¹

One major violation of human rights that occurred in Nazi Germany prior to, and on a greatly increased scale, during World War II, was the incarceration of individuals, both German and foreign, citizens of both friendly and enemy countries, in concentration camps, to which they were sent at the whim of the Gestapo, the SS and the other Nazi security organizations. No judicial proceedings were involved in these actions, either before or during the imprisonment. There was no way to challenge the action, no way to obtain a hearing before an impartial judge. This was obviously a gross violation of human rights both in time of peace and in time of war. Moreover, some of these concentration camps were basically extermination camps, places that were set up for the sole purpose of exterminating inmates on a wholesale scale, individuals whose only offences were that they were merely suspected of less than 100 percent support of the Nazi government, or they were Jews, or gypsies, or citizens of a foreign nation, even though the latter might have been a German ally.¹² For example, it is known that between four million and six million individuals were exterminated by the use of gas at the camp established by the Nazis in Auschwitz, Poland.¹³ Exterminations on a large scale also took place at concentration camps located at Belsen (tried by the British),¹⁴ at Buchenwald¹⁵ and Dachau¹⁶ (tried by the United States), at Natzweiler (tried by the French),¹⁷ etc.

Another Nazi practice which was unquestionably a violation of human rights and which was conducted against both Germans and foreigners, was euthanasia—the killing of persons who were terminally or mentally ill—the individuals whom Hitler called “useless eaters.” Based upon the evidence submitted to it, the International Military Tribunal estimated that some 275,000 individuals had been killed in this manner.¹⁸ Allied war crimes tribunals tried a number of cases involving this blatant violation of human rights;¹⁹ and long after World War II had come to an end, the Federal Republic of Germany succeeded in obtaining the extradition for trial of several individuals, including medical doctors, charged with this offence.²⁰

A number of the post-World War II trials in Europe involved the use of enemy personnel for purposes of medical experiments, many of which completely lacked any merit and practically all of which resulted in the death of the victims.²¹ Such a use of defenceless persons was certainly a violation of human rights and of the humanitarian law of war. At least one such case was

tried by the United States in Japan.²² In addition, the Soviet Union tried a number of members of the Japanese Army on the charge that they had used human beings (Chinese, Russian, and, perhaps, American) to test the efficacy of bacteriological weapons.²³

Two other Nazi practices that constituted violations of human rights, based on orders emanating directly from Hitler, were the so-called *Night and Fog Decree*²⁴ and the *Terrorist and Sabotage Decree*.²⁵ Under the former, the death penalty was to be applicable for all acts committed by non-Germans against the German State or its authorities in occupied territory. Such cases were to be tried in the occupied territory in which they had occurred only if it was probable that a death sentence would be adjudged. Otherwise the accused persons were to be taken to Germany where they were quickly executed without trial or, in rare cases, sent to a concentration camp. Inquiries concerning such persons were to be answered with the statement that "the state of the proceeding did not allow further information," thus keeping the families in ignorance concerning the status of the accused persons, the great majority of whom did not live to return to their homes. This procedure was inhumane and was a gross violation of human rights and of the humanitarian law of war.

The second practice mentioned was based on the *Terrorist and Sabotage Decree*. This decree provided that with respect to all acts of violence by non-Germans directed against German personnel or installations in occupied territory, the offenders were to be overpowered on the spot (this meant they were to be killed). If not apprehended until later, they were to be turned over to the Security Police (again, this meant that they were to be killed). No judicial proceedings to determine guilt were to take place. Death could result from the mere whim of the occupation authorities. Again, this procedure was inhumane and a gross violation of human rights and of the humanitarian law of war. (It is interesting to know that as a humanitarian gesture, women who did not themselves participate in such attacks were only to be given assigned work—and children were to be spared!)

If we consider, as we undoubtedly should, that many of the humanitarian protections to which prisoners of war are entitled, under both the customary and conventional laws of war, are human rights, then these were human rights that were violated on a vast scale by the Germans, by the Soviet Union and by the Japanese. Probably in excess of one million Soviet prisoners of war died from maltreatment in the hands of the Nazis; and approximately a similar number of German prisoners of war never returned from Soviet custody. Strange to relate, the Nazis substantially complied with the humanitarian law of war with respect to British and American prisoners of war, perhaps because they knew that German prisoners of war held by Great Britain and the United States were receiving appropriate humane treatment. There was no such reciprocity on the

part of the Japanese, where violations of the humanitarian law of war for the protection of prisoners of war were standard procedure. In this respect, it is worthy of note that while only four percent of the Americans known to have been in German custody died in captivity, more than 27 percent of the Americans known to have been in Japanese custody did not survive.²⁶

With the possible exception of the Falklands (Malvinas) War between the Argentine and Great Britain,²⁷ incidents involving the denial of human rights and of the humanitarian law of war to enemy civilians and captured enemy personnel have occurred in every international conflict since the end of World War II. This despite the post-war war crimes trials, one of the purposes of which was to establish a precedent beyond dispute that such offences would not go unpunished. However, a number of those conflicts ended in negotiated settlements, that included a requirement for the return of all prisoners of war. That provision necessarily resulted in the repatriation of even those who had been identified as having committed offences, including violations of human rights and of the humanitarian law of war, for which they should have been tried and, if convicted, sentenced to appropriate punishment. Similarly, the leaders of the authoritarian governments which initiated these wars and frequently made violations of human rights a basic element of State policy during such conflicts have gone unpunished. This was true as to one or both of these factors in Korea (1950-53), in Vietnam (1965-72), in the India-Pakistan War (1972), in the Iran-Iraq War (1980-88) and in the Gulf Crisis (1990-91).

In Korea, the United Nations Command had identified and was prepared to try some 200 North Koreans and Chinese Communists charged with violations of the humanitarian law of war applicable to prisoners of war as well as violations of the human rights of South Korean civilians. Because of the provisions of the Armistice Agreement, all of these individuals were repatriated and went unpunished.²⁸

In Vietnam, there were innumerable instances of violations of the humanitarian law of war and innumerable instances of violations of human rights. For example, captured American soldiers and airmen who were wounded received no medical treatment, they were subjected to solitary confinement, confined in prisons, and paraded before hostile crowds, the members of which were permitted and encouraged to assault them with sticks and stones. These were all violations of the humanitarian law of war by the North Vietnamese. Moreover, the Viet Cong executed innocent prisoners of war in reprisal for the execution after trial of Viet Cong terrorists, one of whom had been captured in Saigon while still in possession of a bomb set to explode just five minutes later. These gross violations of the humanitarian law of war by the North Vietnamese and by the Viet Cong received little or no publicity. Unfortunately, the only case that received widespread publicity was the slaughter of a group of

Vietnamese men, women and children by American soldiers, also a gross violation of human rights. Regrettably, because of unwarranted political interference only two trials by court-martial for this incident took place. While the major culprit, one Lieutenant William L. Calley, was convicted of murder by a United States Army court-martial and was sentenced to be punished, his punishment was manifestly inadequate for the offence committed.²⁹

In the December 1972 India-Pakistan conflict, India charged the Pakistani Army with having committed genocide in what was then East Pakistan (now Bangladesh) during an attempt to suppress a revolt in that area. In 1974, India agreed to repatriate the more than 90,000 Pakistani prisoners of war whom they still detained, despite the fact that there had long since been a cessation of active hostilities between the two countries. However, it withheld 195 of them for trial by Bangladesh for the crime of genocide. Pakistan brought an action against India in the International Court of Justice, pointing out that both countries were parties to the Genocide Convention,³⁰ Article 6 of which provides that jurisdiction to conduct trials for violations thereof is limited to the sovereign in whose territory the alleged genocide had occurred (in this case Pakistan) or to an international criminal court (an institution that does not yet exist). By agreement, the 195 prisoners of war were eventually repatriated to Pakistan and the action in the International Court of Justice was discontinued. No trial was conducted by Pakistan. Without intending any criticism of Pakistan, and without passing judgment on the guilt or innocence of any of the 195 Pakistanis singled out by India for trial, this is indicative of the limitations of the Genocide Convention. In most instances, genocide is and will be government sponsored so that, lacking an international criminal court, unless the offence is committed on foreign territory, there will be no punishment of the offending persons. As already noted, during World War II, the Nazis maintained "extermination camps" for the killing of Jews, gypsies, and other persons considered to be "asocial", not only in Germany, but also in Poland and in the Soviet Union. Had the Genocide Convention been in effect at that time, only the subsequent German governments would have been competent to try those accused who had committed their offences in concentration camps located on German territory.³¹

Concerning the maltreatment of prisoners of war by both sides in the Iran-Iraq War, a Special Mission dispatched to those countries by the Secretary-General of the United Nations found that

harsh treatment and violence in the camps [in both countries] were far from uncommon. POWs provided a large volume of information about their physical ill-treatment, by such means as whipping, beating with truncheons or cables, simultaneous blows on both ears, electric shocks, assaults on sexual organs and kicks often inflicted in parts of the body where POWs had suffered wounds.

Physical violence appeared to be particularly common in POW camps in Iraq. We also received reports of collective punishment measures, such as lengthy confinement and deprivation of food and water. . .³²

These actions were, of course, gross violations of the humanitarian law of war, specifically of various provisions of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War.³³

Another violation of the humanitarian law of war which occurred in both Iran and Iraq is worthy of note. Thus, the United Nations Special Mission said:

[W]e also heard allegations of religious pressure on non-Moslem POWs and of conversions to Islam by some Christian POWs. While we were not able to ascertain whether these conversions had taken place under duress, we could not but notice the atmosphere of missionary zeal that permeated some camps.³⁴

If these conversions occurred as a result of duress, as they very probably did, this was contrary to the freedom of religion provisions of Article 34 of Geneva Convention (III) and constituted a violation of human rights and of the humanitarian law of war.

One other statement made by the United Nations Special Mission in its report bears repeating:

Having noted that numerous POWs have spent three or more years in detention, we feel compelled to pose the question: is not prolonged captivity in itself inhuman treatment?³⁵

During World War II, some prisoners of war spent as many as five years in captivity. During Vietnam, some prisoners of war spent as many as seven years in captivity. During the Iran-Iraq conflict, there were undoubtedly prisoners of war on both sides who spent similar lengthy periods in prisoner-of-war camps. These were not criminals serving a well-deserved punishment, but persons who had fought on behalf of their country. Whether their country fights as an aggressor or in defence of its territory and existence, there should be some method of securing the release and repatriation of prisoners of war more humane than awaiting the cessation of active hostilities.³⁶ Perhaps we should return to the processes of exchange and parole, which have not been used on a major scale since the American Civil War of more than a century and a quarter ago. However, if this is to be done, it must be accomplished by an international agreement such as the 1949 Geneva Conventions, negotiated in time of peace. Such a treaty must be complete in itself, as it is extremely difficult, and sometimes impossible, to secure agreements between opposing belligerents during the course of hostilities.³⁷

The 1990-91 Gulf Crisis quickly disclosed that the two-year period which had elapsed since the end of hostilities in the Iran-Iraq War had not brought about any change in the attitude of Saddam Hussein's Iraq with respect to compliance with the humanitarian law of war in general and with human rights in particular. From 2 August 1990, the very first day of Iraq's invasion of Kuwait, violations by Iraq of the humanitarian law of war and of human rights occurred on a massive scale.

At the time of the Iraqi invasion, the members of the civilian population of Kuwait and foreigners in Kuwait were considered "protected persons" within the meaning of Article 4(1) of the 1949 Geneva Convention (IV).³⁸ Thousands of Kuwaiti civilians were murdered and thousands of others were deported to Iraq. Both of these actions constituted violations of human rights and of the humanitarian law of war. Under Article 47 of that Convention, their status was not changed by the announced annexation of Kuwait by Iraq on 8 August 1990, which, in any event, was illegal and ineffective.³⁹ Under Article 35(1) of that Convention, the foreigners had the right to leave Kuwait. The Iraqi authorities ordered that they be detained as hostages. This was a violation of the humanitarian law of war⁴⁰ and a violation of their human rights. Moreover, Iraq magnified the violations by placing hostages in military installations, including chemical weapons factories, in an attempt to immunize those installations from attack by the United Nations Coalition. This, too, was a violation of the humanitarian law of war which specifically provides that "[t]he presence of a protected person may not be used to render certain points or areas immune from military operations."⁴¹ One well-informed author has listed the Iraqi violations of the humanitarian law of war in part as follows:

- * inhumane treatment of protected persons, as prohibited by Article 27 of the Fourth Geneva Convention, including willful killing and the protection of women against rape;
- * torture and brutality directed against protected persons, as prohibited by Article 32 of the Fourth Geneva Convention;
- * the taking of hostages, as prohibited by Article 34 of the Fourth Geneva Convention;
- * mass transfers, detention of protected persons in areas particularly exposed to the danger of war, or transfer of part of an occupying power's own population into the territory it occupies, as prohibited by Article 49 of the Fourth Geneva Convention;
- * compelling protected persons to serve in the armed forces of the occupying power, as prohibited by Article 51 of the Fourth Geneva Convention;
- * setting up places of internment in areas particularly exposed to the danger of war, as prohibited by Article 83 of the Fourth Geneva Convention.⁴²

It is apparent from all of the foregoing that, despite the hundreds of provisions of the codified humanitarian law of war, provisions that establish minimum standards and provisions that specifically prohibit certain actions, in time of war the humanitarian law of war and the laws establishing human rights are all too frequently violated, sometimes by individual behaviour, but perhaps even more often by national policy. Regrettably, we cannot be overly optimistic in this regard with respect to the future conflicts with which our planet will undoubtedly be plagued. However, one great step in the right direction has been taken by the United Nations Security Council in the case of the rampant violations of human rights and of the humanitarian law of war committed by the government and the troops of the former Yugoslavia (Serbia and Montenegro) in the Republics of Bosnia and Herzegovina. Beginning as early as September 1991, a series of resolutions has been adopted by the Security Council with respect to the armed conflict taking place in Bosnia and Herzegovina. Thus, Resolution 771 contains the following preambular provision:

*Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on noncombatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property.*⁴³

Its operative paragraphs include the following:

1. *Reaffirms* that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches;
2. *Strongly condemns* any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing";
5. *Calls upon* States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.

A resolution adopted on 6 October 1992 went a step further, creating a Commission of Experts to examine the information submitted pursuant to the above quoted paragraph 5. The Commission could make its own investigations and was to provide the Secretary-General with its conclusions with respect to the evidence of the violations of international humanitarian law committed in the territory of the former Yugoslavia.⁴⁴

By a resolution adopted on 22 February 1993, the Security Council decided that

an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁴⁵

This resolution requested the Secretary-General to submit proposals for the establishment of such an international tribunal. He did so on 3 May 1993⁴⁶ and by a resolution adopted on 25 May 1993 the Security Council approved the proposals made by the Secretary-General in his Report, including the proposed Statute of the International Tribunal attached to that Report.⁴⁷

Article 1 of the Statute establishes the competence of the International Tribunal "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."⁴⁸ Article 2 gives the Tribunal jurisdiction over "persons committing or ordering to be committed grave breaches of the Geneva Conventions;"⁴⁹ Article 3 gives the Tribunal jurisdiction over "persons violating the laws or customs of war" which include, but are not limited to, those enumerated;⁵⁰ Article 4 gives the Tribunal jurisdiction over genocidal crimes;⁵¹ and Article 5 gives the Tribunal jurisdiction over crimes against humanity.⁵²

While there is no question that major difficulties will be encountered in obtaining personal jurisdiction over individuals charged with violations of human rights and of the humanitarian law of war enumerated in the Statute of the International Tribunal,⁵³ and in collecting the evidence necessary for their convictions, the mere fact that such a Statute has been unanimously adopted by the Security Council augurs well for the future.⁵⁴

In addition to the actions of the Security Council with respect to the violations of the humanitarian law of war by the former Yugoslavia (Serbia and Montenegro) in Bosnia and Herzegovina, on 20 March 1993 the latter two States instituted an action against the former in the International Court of Justice,⁵⁵ in which they asked for and obtained provisional measures of relief.⁵⁶ As there was no change in the activities of Serbia and Montenegro, no refraining from the policy of "ethnic cleansing" (genocide), Bosnia and Herzegovina returned to the Court seeking additional provisional measures of relief.⁵⁷

Meanwhile, following the old adage that "the best defence is a good offence," Serbia and Montenegro countercharged that Bosnia and Herzegovina are themselves guilty of genocide, perpetrated against ethnic Serbs in the territory of the latter two States and, in turn, requested provisional measures of relief.⁵⁸ Unfortunately, there probably is at least some merit to this claim, as the Balkan ethnic groups have a long history of such actions, and there is little reason to believe that today's Bosnian and Herzegovinian Croats and Muslims are radically different from those who preceded them. However, the Court did not grant this request.⁵⁹

It is believed that the foregoing summary clearly indicates that the international community of the twentieth century has, in general, consistently demonstrated a definite and sincere desire to ensure the protection of human rights in time of war. However, with all too great frequency, once hostilities have commenced, the legal protections so humanely granted have tended to be disregarded, often by nations which made great oratorical gestures during the course of drafting negotiations, but probably with no intention whatsoever, should the occasion arise, of complying with the humane provisions that they so strenuously supported. Nevertheless, the actions taken with respect to the former Yugoslavia may be interpreted as a small indication that the international community will no longer tolerate claims to the right of non-interference when a State engages in violations of human rights in time of war.

Notes

1. For early and extended discussions of this distinction, see J. Pictet, *The Principles of International Humanitarian Law* (reprinted from the September, October, and November, 1966, issues of the *International Review of the Red Cross*) (hereinafter: *I.R.R.C.*); J. Pictet, *Humanitarian Law and the Protection of War Victims* (1975); J. Pictet, *Development and Principles of International Humanitarian Law* (1985). See also A. Eide, "The Laws of War and Human Rights - Differences and Convergences;" Robertson, "Humanitarian Law and Human Rights," in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 675, 793, respectively (C. Swinarski ed., 1984) (hereinafter: Swinarski). A recent special section devoted to this subject will be found in 293 *I.R.R.C.* 89-138 (1993).

2. Declaration Concerning Expanding Bullets, The Hague, 29 July 1899, 91 *Brit. Foreign & St. Papers* 1014; 187 *C.T.S.* 459; 1 *Am. J. Int'l L. Supp.* 155 (1907); *The Laws of Armed Conflicts* 109 (D. Schindler & J. Toman eds., 3rd ed., 1988).

3. Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945, as amended: 82 *U.N.T.S.* 279; 3 C.I. Bevans, *Treaties and Other International Agreements of the United States* 1240. (hereinafter: Bevans); 145 *Brit. Foreign & St. Papers* 872; 39 *Am. J. Int'l L. Supp.* 257 (1945); Schindler & Toman, *supra* note 2, at 913. Obviously, most of the offences falling within the definition of "war crimes" constitute violations of human rights and all of the offences falling within the definition of "crimes against humanity" constitute war crimes.

4. Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946, as amended: 4 Bevans, *supra* note 3, at 27; Department of State Publication No. 2613 *Trial of Japanese War Criminals* 39. Art. 5(b) contains only the first general sentence with no enumeration of specific offences. Art. 5(c) omits the word "religious".

5. 4 *Trial of War Criminals* 499 (1949-53) (hereinafter: *T. W. C.*). See also the Trial of Hans Rauter (Dutch Special Court of Cassation), 16 *Ann. Dig.* 533; H. Levie, *Terrorism in War: The Law of War Crimes* 395 (1993) (hereinafter: Levie).

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6. See, for example, UN G.A. Res. 95(I), 16 February 1946, "Affirmation of the principles of international law recognized by the Charter of the Nurnberg Tribunal;" UN G.A. Res. 2712(24), 15 December 1970, "Question of the punishment of war criminals and of persons who have committed crimes against humanity," etc. The Statute of the International Tribunal established by the Security Council of the United Nations in 1993 to try violations of the law of war committed in territory of the former Yugoslavia since 1991 contains two articles on the subject: Article 4, "*Genocide*," and Article 5, "*Crimes against Humanity*." UN Doc. S/25704, 3 May 1993, "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808" (1993), Annex; S/RES/827, 25 May 1993; 32 *I.L.M.* 1192, 1193-94 (1993).

7. J.H.E. Fried, "Transfer of Civilian Manpower from Occupied Territory," 40 *Am. J. Int'l L.* 303, 309 (1946).

8. *Ibid.*, 313; Levie, 294-95, 352-56.

9. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949, 75 *U.N.T.S.* 287; 6 *U.S.T.* 3516; 157 *Brit. Foreign & St. Papers* 355; 50 *Am. J. Int'l L., Supp.*, 724 (1956); Schindler & Toman, *supra* note 2, at 495.

10. Art. 147 of Geneva Convention (IV) makes the "unlawful deportation or transfer" of persons protected by the provisions of the Convention a grave breach thereof - a war crime. All four of the 1949 Geneva Conventions have been so widely ratified or adhered to as to represent universal law. As of September 1993, there were 184 State Parties to these Conventions. 296 *I.R.R.C.*, 465 (1993).

11. The *Trial of Kingoro Fukuda* involved the maltreatment of a number of Chinese civilians who had been brought to Japan to work in a coal mine. This case was tried by the United States Army (with a Chinese officer sitting as a member of the tribunal) in Yokohama as Case No. 74. It may be found in the United States National Archives, Record Group 331, File M1112, Roll 1. The present author was a member of the Board which reviewed the record of this trial.

12. *United States v. Hermann Wilhelm Goering*, 1 *Trial of Major War Criminals* 235 (1947-49) (hereinafter: *T.M.W.C.*).

13. See, for example, The Trial of Rudolf Hoess, 7 *Law Reports of Trials of War Criminals* 11 (1948) (hereinafter: *L.R.T. W. C.*); Levie, 284-85.

14. 13 *Ann. Dig.* 267 (1946); 2 *L.R.T.W.C.* 1 (1947); Levie, 276-77.

15. United States National Archives, Record Group 338, File M1217, Roll 5; Levie, 27879.

16. United States National Archives, Record Group 338, File M1217, Roll 3; Levie, 27981.

17. United Nations Archives, United Nations War Crimes Commission, Reel 50, France 136; Levie, 284.

18. 1 *T.M.W.C.* (1947).

19. Trial of Oswald Pohl, 5 *T.W.C.*, 971-72 (1950); Levie, 300; Trial of Alfons Klein (better known as The Hadamar Trial), 13 *Ann. Dig.* 253 (1946), 1 *L.R.T.W.C.*; Levie, 301.

20. The Gerhard Bohne Case, *London Times*, 16 December 1965, at 8, 2; Levie, 243; State v. Schumann, 39 *I.L.R.* 433 (1947); Levie, 243 n. 75.

21. See, for example, 1 *T.M.W.C.* 171, 231, 252 (1947); Trial of Karl Brandt (better known as The Medical Case), 2 *T.W.C.*, 171; Levie, 76-77, 322-24; Trial of Erhard Milch, 2 *T.W.C.* 773, Levie, 324-25. In the trial of Kurt Heissmeyer, the Democratic Republic of Germany tried and convicted a doctor who had arranged to have the SS murder twenty Jewish children from France, Holland, Italy, Poland and Yugoslavia in order to conceal the fact that he had been using them for medical experiments. See Levie, 441-42.

22. Trial of Kajuro Aihara (better known as The Kyushu University Case), Yokohama Case No. 290, United States National Archives, Record Group 331, File M1112, Roll 4; Levie, *supra* note 5, at 325-26. A brief summary of this case appears at 11 *Dig. Int'l L.* 1006 (M. Whiteman, ed., 1968). An Associated Press dispatch of 6 September 1993 contains admissions by a former Japanese military doctor of the widespread use of this practice by the Japanese in China, using Chinese civilians as the subjects of their experiments.

23. *The Khabarovsk Trial*, Anon., Materials on the Trial of Former Servicemen of the Japanese Army Charged with Manufacturing and Employing Bacteriological Weapons, *passim* (1950) Levie, 178-79.

24. 11 *T.M.W.C.* 527 (1950); Levie, 311-13.

25. 1 *T.M.W.C.* 239 (1950); Levie, 318-19.

26. 1 *The Tokyo Judgment* 385 (B. Röling & C. Ruter eds., 1977).

27. Even in this conflict, charges of violations of the humanitarian law of war have surfaced. A book by a former British paratrooper, published in 1991, alleged that several members of the Argentine armed forces had been shot after they had surrendered. V. Bramley, *Excursion to Hell* 144 & 177 (1991). In May 1993, Argentine President Menem ordered an investigation into allegations that Argentine prisoners of war captured at the Battle of Mount Longdon had been executed by British troops. American Embassy to the Secretary of State, R291041Z May 1993. The British Government dispatched a team of Scotland Yard detectives to

Argentina to investigate the allegations. A report of the results of this investigation was submitted. It was referred to the Public Prosecutor, who determined that the evidence was insufficient for prosecution.

28. Thirty-eight percent of the Americans captured by the North Koreans and Chinese Communists died in captivity, a figure almost ten times the number who had died in German hands during World War II and more than one-third greater than the number who had died in Japanese hands during that conflict. G. Lewy, *America in Vietnam* 340 (1978). See the text in connection with note 26.

29. The Army court martial found him guilty and sentenced him to imprisonment for life. He was released after serving three and one-half years under house arrest due to the unwarranted interference of the then President of the United States. See Levie, 206-208.

30. Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277; 151 *Brit. Foreign & St. Papers* 682; 45 *Am. J. Int'l L. Supp.*, 7 (1951); Schindler & Toman, *supra* note 2, at 231.

31. After World War II, trials for crimes against humanity committed in concentration camps located in Germany were conducted by Great Britain, the United States, and France. For examples of such trials, see *supra* notes 14, 15, 16, and 17. Of course, these trials were conducted by the Occupying Powers as successors to the German governments of Hitler and Doenitz. A current instance of genocide on its own territory as a matter of national policy is the action of Iraq against the Kurds. A current instance of genocide on foreign territory as a matter of national policy ("ethnic cleansing") is the action of Yugoslavia (Serbia and Montenegro) against the non-Serbs of Bosnia and Herzegovina.

32. Prisoners of War in Iran and Iraq, UN Doc. S/16962, 22 February 1985, at para. 273; Levie, 210.

33. Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, 75 U.N.T.S. 135; 6 U.S.T. 3316; 157 *Brit. Foreign & St. Papers* 284; 47 *Am. J. Int'l L. Supp.*, 119 (1953); Schindler & Toman, *supra* note 2, at 423. (See the parenthetical remark in *supra* note 10.)

34. UN Doc. S/16962, *supra* note 32, at para. 276; Levie, 211.

35. S/16962, *supra* note 32, at para. 285.

36. For a general discussion of this problem, see Y. Dinstein, "The Release of Prisoners of War," in Swinarski, *supra* note 1, at 37.

37. While a number of agreements with respect to prisoners of war were reached during the course of World War I, they have been practically non-existent during World War II and subsequent conflicts.

38. See *supra* note 9.

39. S/RES/662, 9 August 1990, 29 *I.L.M.* 1327 (1990); Levie, 213-16.

40. See Arts. 34, 48, 147 of Geneva Convention, *supra* note 9.

41. *Ibid.*, Art. 28.

42. J. Moore, *Crisis in the Gulf: Enforcing the Rule of Law* 53-54 (1992). For a detailed presentation of many of the specific incidents comprising those violations, see also Amnesty International, *Iraq/Occupied Kuwait: Human Rights Violations since 2 August, 1990, passim*.

43. UN S.C. Res. 771, 13 August 1992, 31 *I.L.M.* 1470 (1992). This Resolution was adopted unanimously.

44. UN S.C. Res. 780, 6 October 1992, *ibid.* 1476. This Resolution was adopted unanimously. See also UN S.C. Res. 787, 16 November 1992, *ibid.*, 1481. This Resolution was adopted by a vote of thirteen in favour with two abstentions. (Unfortunately, the Commission met with so little support from the European nations that its Chairman, Fritz Kalshoven of The Netherlands, resigned.)

45. S/RES/808, 22 February 1993.

46. See *supra* note 6. A number of countries submitted proposals for consideration by the Secretary-General in the drafting of the proposed Statute of an International Tribunal. See, for example, UN Doc. S/25266, 10 February 1993 (France); S/25300, 17 February 1993 (Italy); S/25307, 18 February 1993 (Sweden); etc.

47. UN S.C. Res. 827, 25 May 1993, 32 *I.L.M.* 1203 (1993). This Resolution was adopted unanimously. The members of the Tribunal were elected by the General Assembly, in accordance with the provisions of Article 13 of the Statute, and held their first meeting in The Hague.

48. It would have been more appropriate to state that the competence of the International Tribunal was "to hear and decide charges against persons alleged to have been responsible (etc.)." Courts do not (or, at least, should not) prosecute. The International Tribunal will not prosecute, it will try; Art. 16 of the Statute makes the Prosecutor "responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." (This same inappropriate language appears in Arts. 2, 3, 4, and 5 of the Statute.)

49. This article is really based on Article 130 of the 1949 Geneva Convention III, *supra* note 33 and Art. 147 of Geneva Convention IV, *supra* note 9.

50. This article is based on various provisions of the Regulations Annexed to the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 1907, 36 *Stat.* 2277 (1910), 100 *Brit. Foreign & St.*

Papers 338; 1 Bevens, *supra* note 3, at 631; 2 *Am. J. Int'l L. Supp.* 190 (1908); Schindler & Toman, *supra* note 2, at 63.

51. This article is based on Art. 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 30. However, it should be borne in mind that the Statute of the International Tribunal does not purport to enforce the Genocide Convention directly. As we have seen, Art. 6 of that Convention provides that persons charged with its violation

shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

The International Court of Justice has held that it has jurisdiction to make decisions "relating to the interpretation, application or fulfilment" of the Convention, as provided in Art. 9 thereof. [1993] *I.C.J. Rep.* 16, para. 26; ICJ Communique No. 93/28 bis, 13 September 1993, at 9. However, it would not have jurisdiction to conduct a criminal trial of an individual for a violation of the Convention. (*See* Art. 34(1) of the Statute of the Court.)

52. This article is based on Art. 6(c) of the 1945 Charter of the International Military Tribunal (*see* text in connection with *supra* note 3), with the addition of the offences of imprisonment, torture and rape.

53. Art. 29 of the Statute requires States to comply with requests for the arrest and detention of persons made by the International Tribunal. Unfortunately, any representatives of the new Yugoslavia who negotiate an end to the hostilities in Bosnia and Herzegovina in which the humanitarian law of war has been so frequently violated will probably be among the individuals who committed or ordered the commission of those violations—and it can be assumed that they will insist on including in the document ending the hostilities a provision relieving some or all of the violators of responsibility for their offences. Concerning this problem generally, *see* Levie, *supra* note 5, at 42. Moreover, the Statute, by implication, forbids trials *in absentia*. *See* its Art. 21(4)(d) and the Report of the Secretary-General, *supra* note 6, para. 101, 32 *I.L.M.* 1163, 1184.

54. It is worthy of note that not only does Art. 7(2) of the Statute eliminate "Head of State" and "Act of State" defences, and that Art. 7(3) provides for "command responsibility," provisions that have been generally accepted in law-of-war conventions, but that Art. 7(4) eliminates "superior orders" as a defence, something that several diplomatic conferences had declined to do. One cannot help but feel that States vote against a rule denying the defence of superior orders when it might be applied to their own nationals, but favour it here, where only nationals of the former Yugoslavia are involved.

55. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide; I.C.J. Communique No. 93/4, 22 March 1993.

56. *Ibid.*, Order of 8 April 1993, [1993] *I.C.J. Rep.* 3; 32 *I.L.M.* 890 (May 1993); I.C.J. Communique No. 93/9, 8 April 1993, and 93/9 bis, 16 April 1993.

57. I.C.J. Communique No. 93/21, 28 July 1993.

58. I.C.J. Communique No. 93/23, 11 August 1993.

59. I.C.J. Communique No. 93/28, 13 September 1993. The new request by Bosnia and Herzegovina was, in effect, also denied, the Court holding that what was required was "immediate and effective implementation" of the provisional measures set forth in its earlier order of 8 April 1993.